

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against -

MEMORANDUM AND ORDER

LENIN HERRERA,

18 Cr. 13 (NRB)

Defendant.

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NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Defendant Lenin Herrera moves pro se for compassionate release from FCI Allenwood Medium, where he has served less than half of his 70-month sentence for distributing and possessing with intent to distribute cocaine. See ECF No. 43 ("Def. Mot."). Mr. Herrera, who is 34 years old, argues that his kidney stones and complications from his hernia mesh, in the setting of FCI Allenwood Medium during the COVID-19 pandemic, combined with the facts that his wife has contracted COVID-19 and his son suffers from sickle cell anemia, warrant his release. Def. Mot. at 1-2.

Mr. Herrera moves for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i), which permits a court to "reduce a term of imprisonment" if, after considering the factors set forth in 18 U.S.C. § 3553(a), "it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). However, a

court may reduce a defendant's sentence under Section 3582(c)(1)(A)(i) only "upon motion of the Director of the Bureau of Prisons" or "upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). As the proponent of his release, Mr. Herrera bears the burden of demonstrating that his release is justified under Section 3582(c)(1)(A). See United States v. Butler, 970 F.2d 1017, 1026 (2d Cir. 1992).

The Court denies Mr. Herrera's motion for three reasons. First, there is no indication that he has requested that the Bureau of Prisons bring a motion for compassionate release on his behalf. Mr. Herrera has accordingly failed to meet the exhaustion requirement of Section 3582(c)(1)(A), compliance with which this Court has deemed mandatory. See United States v. Pereyra-Polanco, 19 Cr. 10 (NRB), 2020 WL 1862639, at *1 (S.D.N.Y. Apr. 14, 2020).

Second, even if Mr. Herrera had complied with Section 3582(c)(1)(A)'s exhaustion requirement, he has failed to establish extraordinary and compelling reasons for his release. He is 34 years old and does not purport to suffer from, nor does his pre-sentence investigation report dated June 11, 2018 evidence that he suffers from, a medical condition that the CDC has identified as

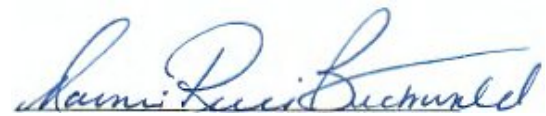
a risk factor for severe illness from COVID-19. See Groups at Higher Risk for Severe Illness, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last updated May 14, 2020). Moreover, while Mr. Herrera could care for his ill wife and son if he were home, his inability to do so while imprisoned is not an extraordinary and compelling reason for his release because it is an inherent feature of his sentence.

Third, even if he could establish extraordinary and compelling reasons for his release, for all of the reasons reviewed at sentencing, the factors set forth in 18 U.S.C. § 3553(a) strongly counsel against releasing Mr. Herrera, who trafficked four kilograms of cocaine from New Jersey into New York City while in possession of a .380 Smith & Wesson handgun.

The Clerk of Court is respectfully directed to terminate the motion pending at ECF No. 43.

SO ORDERED.

Dated: New York, New York
May 21, 2020

A handwritten signature in blue ink, reading "Naomi Reice Buchwald", is written over a horizontal line.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copy to:

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